

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

FRAN JANIK and STEVEN HIRSCH,)	
)	
Plaintiffs,)	No. 1:16:cv-07308-JGK-AJP
)	
v.)	
)	ANSWER AND AFFIRMATIVE
)	DEFENSES
SMG MEDIA, INC.,)	
)	
Defendant.)	JURY TRIAL DEMANDED
)	

Defendant SMG Media, Inc. (“SMG”), by and through its attorneys, respectfully submits this Answer and Affirmative Defenses to the Amended Complaint of Plaintiffs Fran Janik and Steven Hirsch.

NATURE OF THIS ACTION

1. SMG admits that Plaintiffs bring this action for purported copyright infringement under 17 U.S.C. § 101 *et. seq.* and for purported violations of 17 U.S.C. § 1202(b). SMG denies the remaining allegations of paragraph 1 and specifically denies committing any infringement or violation of 17 U.S.C. § 1202 and also denies any liability to Plaintiffs.

2. SMG admits that Plaintiffs bring this action under the Copyright Act. SMG denies committing any infringement or violation of 17 U.S.C. § 1202 and also denies any liability to Plaintiffs. No response is required to the remaining legal conclusions contained in paragraph 2.

3. No response is required to the legal conclusions contained in paragraph 3.

4. No response is required to the legal conclusions contained in paragraph 4.

PARTIES

5. SMG lacks knowledge or information sufficient to admit or deny the allegations of paragraph 5.

6. SMG lacks knowledge or information sufficient to admit or deny the allegations of paragraph 6.

7. SMG admits to being a Delaware corporation. SMG denies the remaining allegations of paragraph 7.

ANSWER TO PURPORTED STATEMENT OF FACTS

8. SMG lacks knowledge or information sufficient to admit or deny the allegations of paragraph 8.

9. SMG denies the allegations of paragraph 9.

10. SMG lacks sufficient knowledge or information to admit or deny the allegations of paragraph 10.

11. SMG lacks sufficient knowledge or information to admit or deny the allegations of paragraph 11.

12. SMG admits that Plaintiffs attach to the Amended Complaint as Exhibit C what appears to be an article from the nypost.com website. The article speaks for itself. SMG lacks sufficient knowledge or information to admit or deny the remaining allegations of paragraph 12.

13. SMG lacks sufficient knowledge or information to admit or deny the allegations of paragraph 13.

14. SMG lacks sufficient knowledge or information to admit or deny the allegations of paragraph 14.

15. SMG admits that Plaintiffs attach to the Amended Complaint as Exhibit D copies of what appear to be articles from the SPIN.com website. The articles speak for themselves.

SMG denies the articles “prominently featured” the Guccione Photograph.

16. SMG denies the allegations of paragraph 16.

17. SMG denies that Plaintiffs attached to the Amended Complaint any document labeled as Exhibit E. SMG denies the article “prominently featured” the Kiehm Photograph.

18. At this time, SMG lacks sufficient knowledge or information to admit or deny the allegations of paragraph 18.

ANSWER TO FIRST PURPORTED CLAIM FOR RELIEF

19. SMG incorporates by reference its responses to paragraphs 1-18.

20. SMG denies the allegations of paragraph 20.

21. SMG denies the allegations of paragraph 21.

22. SMG denies the allegations of paragraph 22.

23. SMG denies the allegations of paragraph 23.

24. SMG denies the allegations of paragraph 24.

25. SMG denies the allegations of paragraph 25.

26. SMG denies the allegations of paragraph 26.

ANSWER TO SECOND PURPORTED CLAIM FOR RELIEF

27. SMG incorporates its responses to paragraphs 1-26.

28. SMG denies the allegations of paragraph 28.

29. SMG denies the allegations of paragraph 29.

30. SMG denies the allegations of paragraph 30.

31. SMG denies the allegations of paragraph 31.
32. SMG denies the allegations of paragraph 32.
33. SMG denies the allegations of paragraph 33.

AFFIRMATIVE DEFENSES

LACK OF ORIGINALITY OR *DE MINIMIS* USE

1. The allegedly infringed photographs lack sufficient originality for copyright protection. In the alternative, the photographs possess such little originality that SMG's alleged use of the photographs is the type of use that the courts consider to be *de minimis*.

OWNERSHIP OR JOINT AUTHORSHIP

2. With respect to the Guccione Photograph, SMG either owns the photograph or qualifies as a joint author of the photograph.

AUTHORIZATION

3. With respect to the Guccione Photograph, SMG was authorized to use the photograph.

IMPLIED LICENSE

4. In the alternative to the second and third affirmative defenses stated above, SMG has an irrevocable implied license to use the Guccione Photograph.

ESTOPPEL AND WAIVER

5. Plaintiffs' claims and the relief they request are barred by the doctrines of equitable estoppel and waiver.

UNCLEAN HANDS

6. Plaintiffs' claims are barred by the doctrine of unclean hands.

LACHES

7. The equitable relief requested by Plaintiffs is barred by the doctrine of laches.

FAIR USE

8. Plaintiffs' claims are barred by the doctrine of fair use.

MISUSE

9. Plaintiffs' claims are barred by the doctrine of copyright misuse.

FRAUD ON THE COPYRIGHT OFFICE

10. Janik committed fraud on the Copyright Office by, *inter alia*, misrepresenting he was the sole author of the Guccione Photograph. Plaintiffs committed fraud on the Copyright Office by misrepresenting that the photographs qualify as published.

LACK OF STANDING

11. Janik owns no valid copyright interest in the Guccione Photograph and thus lacks standing.

FAILURE TO MITIGATE

12. Plaintiffs failed to mitigate their damages.

INNOCENT INFRINGEMENT

13. Plaintiff's damages, if any, are limited by the doctrine of innocent infringement and by 17 U.S.C. § 504(c).

STATUTE OF LIMITATIONS

14. Janik's claim is barred, in whole or in part, by the statute of limitations, 17 U.S.C. § 507.

FAILURE TO STATE A CLAIM

15. Plaintiffs' Complaint fails to state a claim for relief.

WHEREFORE, SMG prays that the Court enter judgment in favor of SMG on all of Plaintiffs' claims; that the Court deny all of Plaintiffs' requested relief; and that the Court grant a judgment in favor of SMG ordering Plaintiffs to pay SMG's full attorneys' fees and costs for defending this lawsuit pursuant to 17 U.S.C. § 505.

DATED: March 22, 2017

By: /s/ J. Matthew Williams

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